ANNUAL REPORT
U.S. MERIT SYSTEMS PROTECTION BOARD

Moving Ahead to the 21st Century

SUBMITTED TO THE PRESIDENT AND THE CONGRESS OF THE UNITED STATES
FISCAL YEAR 1999

U.S. Merit Systems Protection Board
Washington, D.C.

The President
The President of the Senate
The Speaker of the House of Representatives

Dear Sirs:

In accordance with 5 U.S.C. § 1206, we are pleased to submit the Twenty-first Annual Report of the U.S. Merit Systems Protection Board. The report reviews the significant activities of the Board during fiscal year 1999, including the Federal employee appeals and other cases decided by the Board.

The Board and its regional and field offices closed 9,806 cases during fiscal year 1999. The Board's administrative judges decided 7,669 appeals, stay requests, and addendum cases. The 3-member Board decided 2,031 cases under its appellate jurisdiction, principally petitions for review (PFRs) of its judges' initial decisions. At headquarters, the Administrative Law Judge issued initial decisions in 12 cases arising under the Board's original jurisdiction, and the Board completed action on 94 original jurisdiction cases.

The average time to process appeals and addendum cases in the regional and field offices was 100 days. Approximately 20 percent of initial decisions by judges result in a PFR to the Board, where the average processing time was 222 days. This means that, on average, a case processed through both levels of the Board was completed in just under 11 months. Timely processing is important because most of the cases that come to the Board are appeals of agency personnel actions. Early resolution of these disputes benefits all parties, as well as the taxpayers who fund Government activities.

One important measure of the Board's performance of its statutory mission is the extent to which its decisions are upheld by its principal reviewing court, the U.S. Court of Appeals for the Federal Circuit. Of the 403 final Board decisions reviewed by the court in fiscal year 1999, 93 percent were unchanged by the court's decisions.

The Board also has a statutory responsibility to conduct studies of the merit systems and to review the significant actions of OPM. In fiscal year 1999, the Board's studies function included two major reports on basic personnel issues: hiring under a decentralized civil service and dealing with poor performers.

Respectfully submitted,

Ben L. Erdreich
Chairman

Beth S. Slavet
Vice Chairman

Susanne T. Marshall
Member

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BOARD MISSION AND JURISDICTION

MISSION

The U.S. Merit Systems Protection Board (MSPB) was established by the Civil Service Reform Act of 1978 (CSRA), Public Law 95-454, as a successor agency to the Civil Service Commission. It is an independent, quasi-judicial agency in the Executive Branch that serves as the guardian of Federal merit systems.

The Board's mission is to ensure that Federal employees are protected against abuses by agency management, that Executive Branch agencies make employment decisions in accordance with the merit system principles, and that Federal merit systems are kept free of prohibited personnel practices. The Board accomplishes its mission by:

- Hearing and deciding employee appeals from agency personnel actions and other matters under the Board's appellate jurisdiction;
- Hearing and deciding cases brought by the Special Counsel involving alleged abuses of the merit systems, and other cases arising under the Board's original jurisdiction;
- Conducting studies of the civil service and other merit systems in the Executive Branch to determine whether they are free of prohibited personnel practices; and
- Providing oversight of the significant actions and regulations of the Office of Personnel Management (OPM) to determine whether they are in accord with the merit system principles and free of prohibited personnel practices.

JURISDICTION

Appellate Jurisdiction

Agency personnel actions that Federal employees may appeal to the Board include: adverse actions (removals, suspensions of more than 14 days, reductions in grade or pay, and furloughs of 30 days or less), performance-based removals or reductions in grade, denials of within-grade increases, certain reduction-in-force (RIF) actions, denials of restoration to duty or reemployment rights, and removals from the Senior Executive Service (SES) for failure to be recertified. Determinations by OPM in employment suitability and retirement matters are also appealable to the Board.

When an issue of discrimination prohibited by the Civil Rights Act of 1964 and other anti-discrimination laws is raised in connection with an appealable personnel action, the Board has jurisdiction over both the appealable action and the discrimination issue. Such appeals are termed "mixed cases." In these cases, an appellant may ask the Equal Employment Opportunity Commission (EEOC) to review the final decision of the Board. If the EEOC disagrees with the Board's decision on the discrimination issue, the case is returned to the Board. The Board may concur with EEOC, affirm its previous decision, or affirm its previous decision with modifications. If the Board does not concur in the EEOC decision, the case is referred to a Special Panel for a final decision. (A Special Panel is convened when needed and is composed of a Chairman appointed by the President, one member of the Board, and one EEOC commissioner.)

Under the Whistleblower Protection Act of 1989 (WPA), personnel actions—including appointments, promotions, details, transfers, reassignments, and decisions concerning pay, benefits, awards, education, or training—that are not normally appealable to the Board may be appealed to the Board under certain circumstances. Such actions may be appealed to the Board *only* if the appellant alleges that the action was taken because of whistleblowing, *and* if the appellant first filed a complaint with the Special Counsel and the Special Counsel did not seek corrective action from the Board.

In recent years, the Board's jurisdiction has been extended. Under the 1994 Uniformed Services Employment and Reemployment Rights Act (USERRA), the Board has jurisdiction over complaints alleging a violation of Chapter 43 of Title 38, relating to the employment and reemployment rights of persons who have served in the uniformed services. This Act also prohibits discrimination against individuals because of their service in a uniformed service. Early in fiscal year 1999, USERRA was amended (Public Law 105-368) to extend the Board's jurisdiction to claims that accrued under the predecesor veterans' reemployment rights (VRR) statute prior to the 1994 effective date of USERRA.

Also during fiscal year 1999, Congress extended the Board's jurisdiction through the enactment of the Veterans' Employment Opportunities Act of 1998 (Public Law 105-339). Under this Act, a preference eligible employee may file an appeal with MSPB based on a violation of any law or regulation relating to veterans' preference, after first filing a complaint with the Department of Labor (DOL) and allowing DOL 60 days to try to resolve the matter. In addition, a violation of veterans' preference is now a prohibited personnel practice, allowing the Special Counsel to petition the Board to order disciplinary action against an employee who commits such a violation.

The 1996 Presidential and Executive Office Accountability Act authorizes appeals to MSPB by employees in the Executive Office of the President based on violations of a number of workplace laws, including the Family and Medical Leave Act, Fair Labor Standards Act, Employee Polygraph Protection Act, and Worker Adjustment and Retraining Notification Act, as well as USERRA.

For the Board to have jurisdiction over an appeal, it must possess jurisdiction over both the action and the individual filing the appeal. The employees and others (e.g., applicants for employment, annuitants in retirement cases) who may appeal specific actions vary in accordance with the law and regulations governing the specific action. For some actions, classes of employees, such as political appointees, and employees of specific agencies are excluded.

With respect to adverse actions, which account for half of all appeals to the Board, the following categories of employees have appeal rights: (1) employees in the competitive service and preference eligible employees in the excepted service who have completed their probationary period; (2) non-preference eligible employees in the excepted service (excluding those in the Postal Service and certain other agencies) who have completed two years current continuous service in an Executive agency; and (3) non-preference eligible supervisors and managers in the Postal Service.

Original Jurisdiction

Cases that arise under the Board's original jurisdiction include:

- Corrective and disciplinary actions brought by the Special Counsel against agencies or Federal employees who are alleged to have committed prohibited personnel practices, or to have violated certain civil service laws, rules or regulations;
- Requests for stays of personnel actions alleged by the Special Counsel to result from prohibited personnel practices;
- Disciplinary actions brought by the Special Counsel alleging violation of the Hatch Act;
- Certain proposed actions brought by agencies against administrative law judges;

- Requests for review of an OPM regulation or of an angeny's implementation of an OPM regulation; and
- Informal hearings in cases involving proposed performance-based removals from the Senior Executive Service.

Judicial Review

With two exceptions, judicial review of final Board decisions in both appellate and original Jurisdiction cases lies in the U.S. Court of Appeals for the Federal Circuit. The exceptions are:

- Board decisions in mixed cases may be appealed to an appropriate U.S. district court, may be appealed to an appropriate U.S. district court.) If review of all issues *except* the discrimination issue is requested, however., a mixed case appellant may elect review by the Federal Circuit.
- In Hatch Act cases involving State or local Government employees, Judicial review lies first in the U.S. district courts and then in the regional courts of appeals.

The Director of OPM may petition the Board for reconsideration of a final decision. The Director also may seek Judicial review in the Federal Circuit of Board decisions that have a substantial impact on a civil service law, rule, regulation, or policy.

BOARD MEMBERS

The bipartisan Board consists of a Chairman, a Vice Chairman, and a Member, with no more than two of its three members from the same political party. Board members are appointed by the President, confirmed by the Senate, and serve overlapping, non-renewable 7-year terms.

CHAIRMAN

BEN L. ERDREICH became Board Chairman on July 2, 1993, following his nomination by President Clinton and confirmation by the Senate. His term appointment expires March 1, 2000. Previously, he served for 10 years in the U.S. Congress as the representative of the 6th District of Alabama. He was a member of the Committee on Banking, Finance and Urban Affairs and chaired its Subcommittee on Policy Research and Insurance. Mr. Erdreich was a Member of the Jefferson County (Alabama) Commission from 1974 to 1982. Prior to that, he was a partner in the firm of Cooper, Mitch & Crawford, Attorneys, in Birmingham, Alabama. He served in the Alabama House of Representatives from 1970 to 1974. He is a graduate of Yale University and received his J.D. degree from the University of Alabama School of Law. He is admitted to the Alabama and District of Columbia bars and is a member of the Federal Circuit, District of Columbia, Alabama, and Birmingham bar associations.

VICE CHAIRMAN

BETH S. SLAVET took the oath of office as Vice Chairman and member of the U.S. Merit Systems Protection Board on August 15, 1995, following her nomination by President Clinton and confirmation by the Senate. Her term appointment expires March 1, 2002. Ms. Slavet served as Labor Counsel to the Committee on Labor and Human Resources of the U.S. Senate from March 1993 until January 1995. Previously, she was Legislative Counsel and Staff Director for U.S. Representative Chester Atkins (D-MA). From 1984 to 1992, Ms. Slavet was an attorney in private practice in Washington, DC, representing public and private sector unions and employees. Prior to that, she served as the staff attorney to the American Federation of Government Employees Local 1812 in Washington, DC. She is a graduate of Brandeis University and received her J.D. degree from the Washington University School of Law. She is admitted to the District of Columbia Bar and is a member of the Federal Circuit and District of Columbia bar associations.

MEMBER

SUSANNE T. MARSHALL was sworn in as Member of the Board on November 17, 1997, following her nomination by President Clinton and confirmation by the Senate. Her term appointment expires March 1, 2004. She served on the staff of the Committee on Governmental Affairs of the United States Senate, with jurisdiction over all Federal employee personnel issues, from December 1985 until her appointment. During that time, she served three distinguished members of the Senate—Chairman/Ranking Republican William V. Roth, Jr., of Delaware (1985-1995), Chairman Ted Stevens of Alaska (1995-1996), and Chairman Fred Thompson of Tennessee (1997). Before that, she held positions in the House of Representatives as Republican Staff Assistant to the Committee on Government Operations (1983-1985) and as Legislative Assistant on the staff of a Member from Georgia (1981-1982). She has also worked in the private sector while living in Georgia (1976-1981) and for a trade association in Washington, DC (1972-1976). She attended the University of Maryland in Munich, Germany, and the American University.

PREPARING MSPB FOR THE 21ST CENTURY

Reflections by Chairman Ben L. Erdreich

It seems appropriate to add a personal note to the Board's 1999 Annual Report on the state of the Merit Systems Protection Board (MSPB) as we begin a new century. This will be my last report as I reach the culmination of my 7-year term as the agency's Chairman. MSPB looks very different than it did in 1993 when I began my tenure. As the new century begins, I look back with pride at the changes in the Board and look forward with confidence to a Board prepared to carry out its missions of protecting the Federal merit systems through fair and impartial adjudication of personnel matters and through studies designed to ensure that human resources are well managed.

Although the Board remains committed to timely processing of the approximately 10,000 cases it receives a year and issuing fair and impartial decisions, MSPB has changed almost every aspect of its operations. We have streamlined our procedures, rewritten regulations to communicate more clearly, and reorganized to intensify the focus on case adjudication. MSPB has reduced the number of its offices, retrained administrative employees to perform paralegal functions, and contracted out administrative operations like payroll and personnel. Today, MSPB, with 250 employees, is significantly smaller, at 77 percent of its 1993 staffing (323 employees). Among the Board's new priorities are efficiency and heightened customer service. Performance and accountability matter at MSPB.

The new reality of Government is information technology. Initiatives begun early in my term have moved the Board in the direction of a paperless office, including electronic case files and the filing of appeal materials on-line via computer. Our goal is to allow our clientele to do business with the Board on a 7-day a week, 24-hour a day basis. Through information technology, MSPB has been able to alter its operations and improve delivery of its services. We have revolutionized the hearing process through video conferencing, and saved time and money for the Board, appellants, and agencies. Our web site—which received over 373,000 hits in FY 1999—gives everyone immediate access to everything from MSPB decisions and studies of civil service issues to Board regulations and forms to file appeals.

Since 1993, MSPB has increasingly focused on review of merits issues. We now dismiss fewer appeals as untimely. Regulations have been changed to extend filing times for appeals and attorney fee requests and to eliminate restrictive requirements on filing. We have implemented a policy permitting judges to issue oral decisions from the bench in certain cases to provide our customer a more expeditious delivery.

Hard work by our staff in the regions and at headquarters has made our decision-making pace stand out among adjudicators. Our initial decisions were rendered, on average, in 100 days for FY 1999, which is close to our FY 1993-1998 average of 95 days. At headquarters, the average age of a case pending before the Board was 102 days. We have reduced our cases pending over a year from almost 100 and are approaching "zero."

During the past seven years, MSPB has strengthened its already successful alternative dispute resolution program. Although settlement of 50 percent of the initial appeals continues to be an important mainstay of the Board's ADR efforts, the Board has also focused on ADR at earlier and later stages of an employment dispute. MSPB has changed its procedures to allow parties to a dispute to agree to additional time to pursue settlement both before and after an appeal has been filed. In 1993, we implemented a PFR settlement program—extending the ADR program to cases decided by the three Board members. Most recently, the Board focused on early intervention. During the report year, we initiated a formal training program to help employees and organizations resolve disputes while still at the agency level. Under this program, trained and certified dispute resolution specialists at the agencies will intercept employee disputes before appeals are filed with the Board.

With its new look, new resources, and renewed focus, the Board is ready to play its part in the new century to ensure that the Federal workplace is managed according to merit principles. These are more than just another set of legal requirements; at the heart of the merit system are public service values: individual accountability, non-partisanship, merit-based employment, fairness, and equity. MSPB was created not simply as a superior form of dispute resolution; adjudication before the Board is a way to implement and preserve these public values crucial to a democratic society. It has been my privilege to participate as Chairman in the work of the Board.

Ben L. Erdreich
Chairman

BOARD ORGANIZATION

The **Chairman**, **Vice Chairman**, and **Member** adjudicate the cases brought to the Board. Each has his/her individual office. The **Chairman**, by statute, is the chief executive and administrative officer of the Board. Office heads report to the Chairman through the Chief of Staff.

The **Office of Regional Operations** provides leadership to the MSPB regional offices in carrying out their adjudicatory and administrative functions. The five regional offices (including five field offices) receive and process initial appeals and related cases filed with MSPB. Administrative judges in the regional and field offices may also adjudicate corrective actions brought by the Special Counsel when such cases are reassigned from headquarters. The judges are responsible for adjudicating assigned cases and for issuing fair and well-reasoned initial decisions.

The **Office of the Administrative Law Judge** adjudicates and issues initial decisions in Hatch Act cases, corrective and disciplinary action complaints brought by the Special Counsel, and proposed agency actions against administrative law judges. The Administrative Law Judge is authorized to decide initial Special Counsel stay requests under authority delegated by individual Board members and to hold informal hearings in performance-based removals from the SES. The Administrative Law Judge also adjudicates and issues initial decisions in MSPB employee appeals, appeals involving classified information affecting national security, and other cases assigned by the Board.

The **Office of Appeals Counsel** prepares proposed decisions that recommend appropriate action in cases where a party petitions for review of a judge's initial decision and in all other cases decided by the 3-member Board, except for those cases assigned to the Office of the General Counsel. The office conducts legal research and submits proposed opinions to the Board for final adjudication. It also conducts the Board's petition for review settlement program, processes interlocutory appeals of rulings made by judges, makes recommendations on reopening cases on the Board's own motion, and provides research and policy memoranda to the Board on legal issues.

The **Office of the Clerk of the Board** receives and processes cases filed at Board headquarters, rules on certain procedural matters, and issues the Board's Opinions and Orders. The office serves as the Board's public information center, including providing information on the status of cases, distributing copies of Board decisions and publications, and operating the Board's Library and on-line information services. The office answers requests under the Freedom of Information and Privacy Acts at the Board's headquarters and responds to all other information requests except those for which the Office of the General Counsel or the Office of Policy and Evaluation is responsible. The office also certifies official records to the courts and Federal administrative agencies, and manages the Board's records and directives system, legal research programs, and the Government in the Sunshine Act program.

The **Office of the General Counsel**, as legal counsel to the Board, provides advice to the Board and its organizational components on matters of law arising in day-to-day operations. Pursuant to the Board's statutory authority under 5 U.S.C. § 1204(i), the office represents the Board in litigation. It also prepares proposed decisions for the Board on assigned cases, including requests to review OPM regulations and cases involving enforcement of Board orders. The office coordinates the Board's legislative policy and congressional relations functions; responds to requests for non-case related information from the White House, Congress, and the media; and produces public information

publications and the agency's annual report to the President and the Congress. The office also conducts the Board's ethics program and plans and directs audits and investigations.

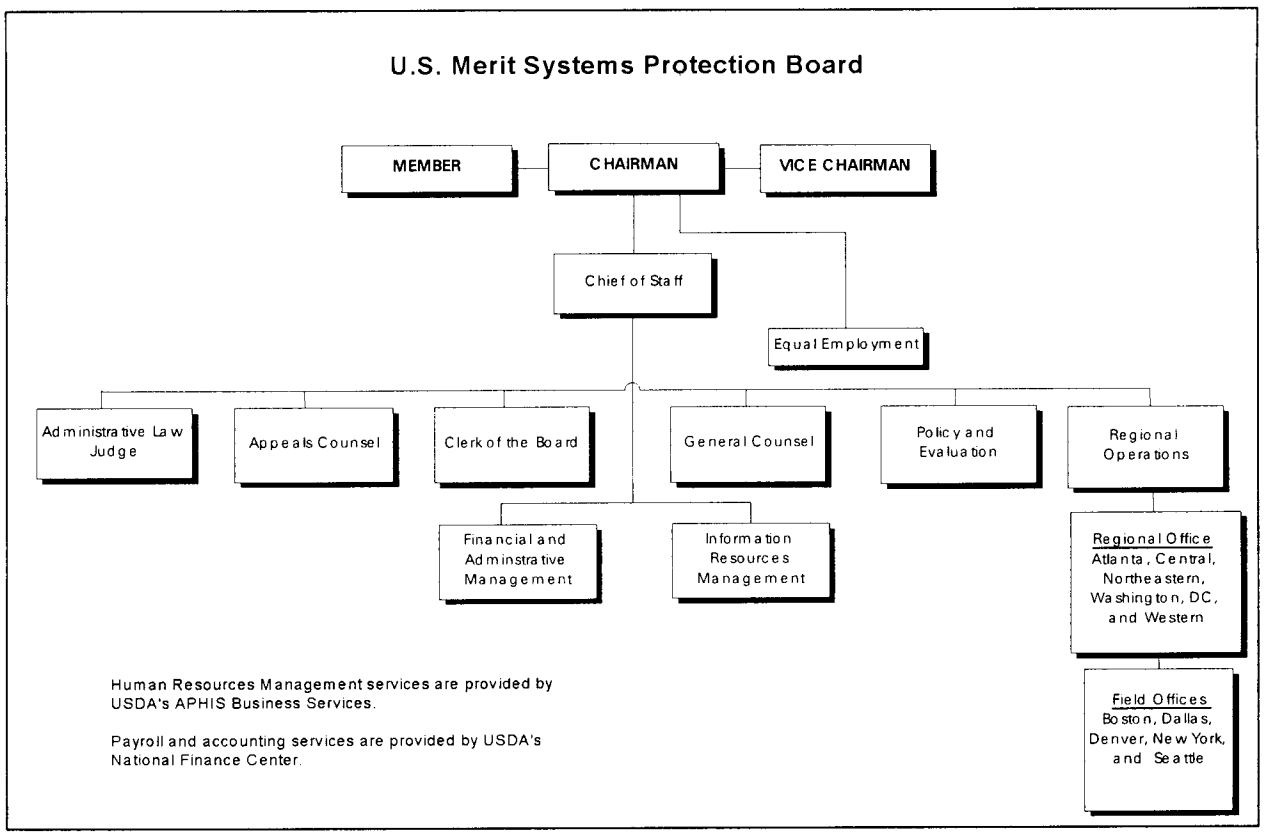
The **Office of Policy and Evaluation** carries out the Board's statutory responsibility to conduct special studies of the civil service and other merit systems, including annual oversight reviews of the Office of Personnel Management. Reports of these studies are directed to the President and the Congress and are distributed to a national audience. The office disseminates information about the Board's studies through outreach appearances, articles, and electronic media. The office also responds to requests from Federal agencies for information, advice, and assistance on issues that have been the subject of Board studies.

The **Office of Equal Employment Opportunity** plans, implements, and evaluates the Board's equal employment opportunity (EEO) programs. It processes complaints of alleged discrimination and furnishes advice and assistance on affirmative action initiatives to the Board's managers and supervisors.

The following administrative divisions operate under the supervision of the Chief of Staff:

The **Financial and Administrative Management Division** administers the budget, procurement, property management, physical security, and general services functions of the Board. It develops and coordinates internal management programs and projects, including review of internal controls agencywide. It also administers the agency's cross-servicing arrangements with the U.S. Department of Agriculture's National Finance Center (NFC) for accounting and payroll services and with ABS (APHIS Business Services) for human resources management services.

The **Information Resources Management Division** develops, implements, and maintains the Board's automated information systems in order to help the Board manage its caseload efficiently and carry out its administrative and research responsibilities.



REGIONAL AND FIELD OFFICE JURISDICTIONS

Atlanta Regional Office
Alabama, Florida, Georgia, Mississippi, South Carolina, and Tennessee

Central Regional Office
Illinois; Indiana; Iowa; Kansas City, Kansas; Kentucky; Michigan; Minnesota; Missouri; Ohio; and Wisconsin

Dallas Field Office
Arkansas, Louisiana, Oklahoma, and Tennessee

Northeastern Regional Office
Delaware, Maryland (except the counties of Montgomery and Prince George's), New Jersey (except the counties of Bergen, Essex, Hudson, and Union), Pennsylvania, and West Virginia

Boston Field Office
Connecticut, Maine, Massachusetts, New Hampshire, Rhode Island, and Vermont

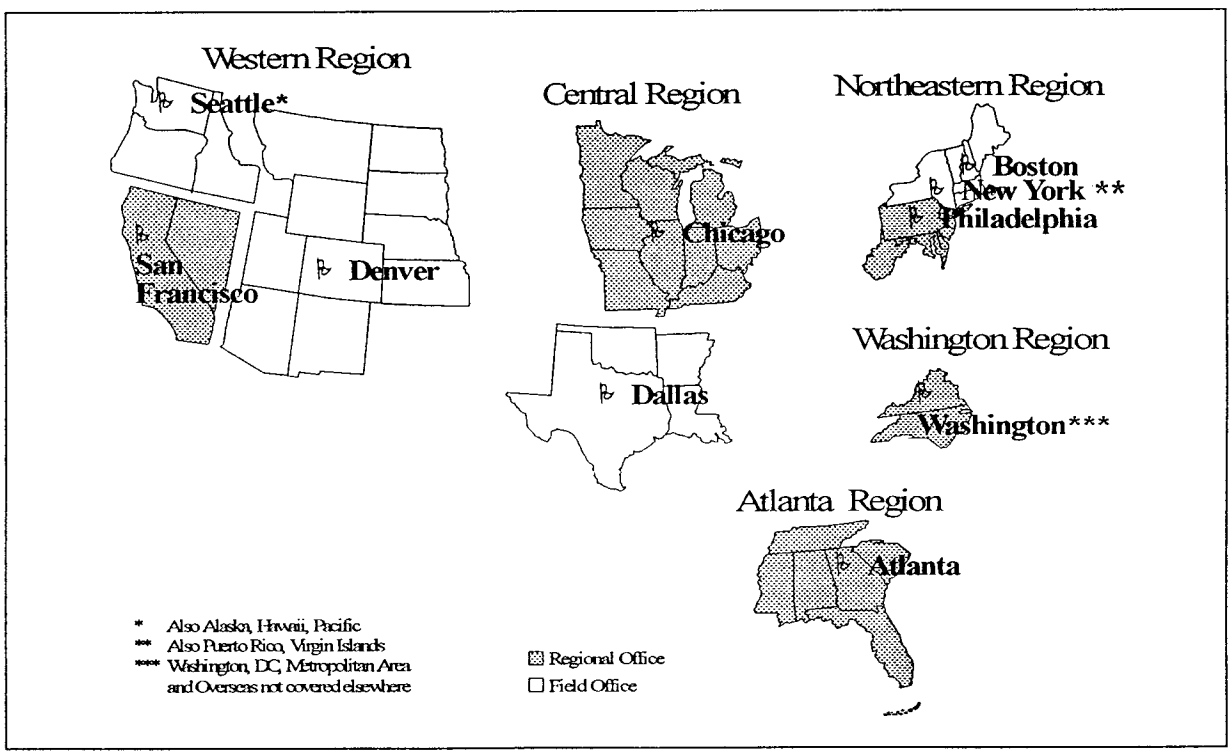
New York Field Office
New Jersey (counties of Bergen, Essex, Hudson, and Union), New York, Puerto Rico, and Virgin Islands

Washington Regional Office
Washington, D.C.; Maryland (counties of Montgomery and Prince George's); North Carolina; Virginia; and all overseas areas not otherwise covered

Western Regional Office
California and Nevada

Denver Field Office
Arizona, Colorado, Kansas (except Kansas City), Montana, Nebraska, New Mexico, North Dakota, South Dakota, Utah, and Wyoming

Seattle Field Office
Alaska, Hawaii, Idaho, Oregon, Washington, and Pacific overseas areas



FISCAL YEAR 1999 CASE PROCESSING - STATISTICAL HIGHLIGHTS

CASES DECIDED BY MSPB IN FY 1999

Regional Office (RO)/Field Office (FO) Decisions:	
Appeals [1]	6,369
Addendum Cases [2]	1,176
Stay Requests [3]	124
TOTAL RO/FO Decisions	**7,669**
ALJ Decisions - Original Jurisdiction Cases [4]	**12**
Board Decisions:	
Appellate Jurisdiction:	
PFRs - Appeals	1,748
PFRs - Addendum Cases	191
Reviews of Stay Request Rulings	0
Requests for Stay of Board Order	0
Reopenings [5]	5
Court Remands	25
Compliance Referrals	58
EEOC Non-concurrence Cases	2
Arbitration Cases [6]	2
Subtotal	2,031
Original Jurisdiction [7]	94
TOTAL Board Decisions [8]	**2,125**
TOTAL Decisions (Board, ALJ, RO/FOs)	**9,806**

See next page for footnotes.

FOOTNOTES TO TABLE

1 Includes 7 initial appeals transferred to Board headquarters and adjudicated by ALJ. These were appeals filed by administrative law judges challenging OPM employment practices.

2 Includes 313 requests for attorney fees, 17 requests for compensatory damages (discrimination cases only), 7 requests for consequential damages (whistleblower cases only), 574 petitions for enforcement, 246 Board remand cases, and 19 court remand cases.

3 Includes 82 stay requests in whistleblower cases and 42 in non-whistleblower cases.

4 Covers initial decisions issued by ALJ. Case type breakdown: 5 OSC corrective actions (3 initial cases plus 2 attorney fee cases), 4 OSC disciplinary actions (2 attorney fee cases and 1 remand related to non-Hatch Act disciplinary actions plus 1 initial Hatch Act case), and 3 actions against ALJs.

5 Includes 4 cases reopened by the Board on its own motion and 1 case where OPM requested reconsideration.

6 Includes 1 initial arbitration case and 1 attorney fee case.

7 Covers final Board decisions. Case type breakdown: 10 OSC stays; 2 OSC corrective actions (1 initial case plus 1 compliance case), 4 OSC disciplinary actions (including 1 reopening), 1 action against ALJ, and 77 regulation review requests.

8 In addition to the 2,125 cases closed by the Board with a final decision, there were 17 interlocutory appeals decided by the Board in FY 1999. Interlocutory appeals typically raise difficult issues or issues not previously addressed by the Board.

KINDS OF APPELLATE JURISDICTION CASES

The kinds of appellate jurisdiction cases in which the Board's administrative judges issue initial decisions or orders are:

- *Appeal* (or *Initial Appeal*) - A request by an appellant that the Board review an agency action.
- *Stay Request* - A request that the Board order a stay of an agency action (authorized only where the appellant alleges that the action was or is to be taken because of whistleblowing).
- *Motion for Attorney Fees* - A request by an appellant who prevails in an appeal that the Board order the agency to pay the appellant's attorney fees.
- *Request for Compensatory Damages* - A request by an appellant who prevails in a mixed case appeal on the basis of discrimination for payment of compensatory damages under the Civil Rights Act of 1991.
- *Request for Consequential Damages* - A request by an appellant who prevails in a whistleblower appeal for payment of consequential damages, as authorized by 5 U.S.C. § 1221.
- *Petition for Enforcement* - A request by a party to an appeal that the Board enforce a final decision or order.
- *Remand* - A case returned to an administrative judge by the Board or court, after an initial decision has been issued, for additional processing and issuance of a new initial decision.

Attorney fee cases, petitions for enforcement, requests for damages, and remands, as a group, are termed "addendum cases" by the Board.

Just over 20 percent of initial appeals decided result in the filing of a petition for review at Board headquarters. In these and other matters, the Board issues final decisions or orders:

- *Petition for Review (PFR)* - A request by a party that the Board review an initial decision of an administrative judge. A petition for review may be filed with respect to an initial decision on an appeal or in an addendum case.
- *Request to Review Stay Ruling* - A request by a party that the Board review an administrative judge's order ruling on a stay request.
- *Petition to Review Arbitrator's Award* - A request that the Board review an arbitrator's award where the employee has grieved an action appealable to the Board and the employee raises an issue of prohibited discrimination.
- *Reopening on the Board's Own Motion* - A case that the Board reopens on its own motion, to reconsider either an initial decision of an administrative judge or a final Board decision.
- *OPM Request for Reconsideration* - A request by the Director of OPM that the Board reconsider a final decision.
- *Court Remand* - A case returned to the Board by a court, after an appellant or the Director of OPM has sought judicial review of a final Board decision, for issuance of a new decision. Also, a case returned by a court where the Board has requested remand.
- *EEOC Non-concurrence* - A mixed case returned to the Board by the EEOC, after an appellant has sought EEOC review of a Board decision, in which the EEOC does not concur with the Board decision on the discrimination issue.
- *Compliance Referral* - A case referred to the Board by an administrative judge for enforcement of a final Board decision or order, upon the administrative judge's finding that a party is not in compliance.

- *Request for Stay of Board Order* - A request by a party that a final order of the Board be stayed pending judicial review or a request for reconsideration by the Director of OPM.

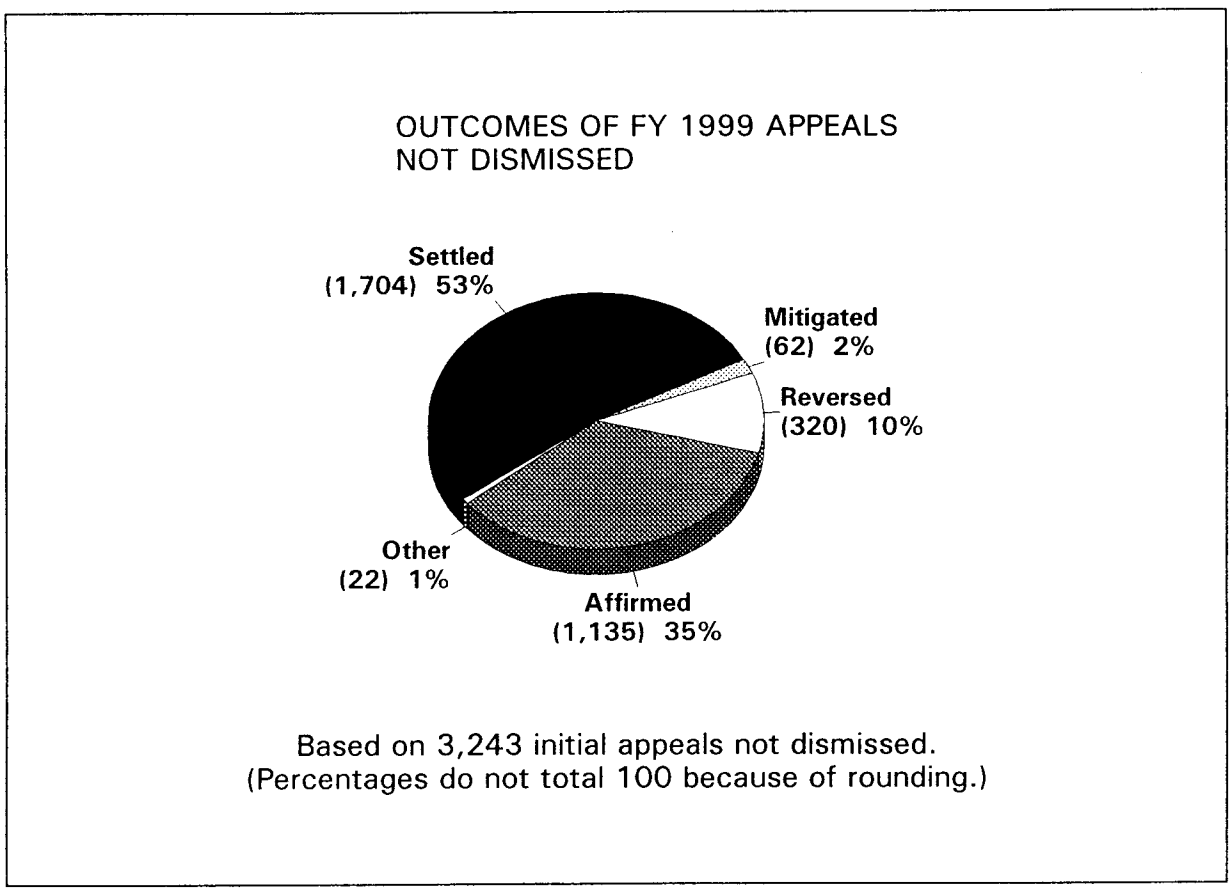
APPELLATE CASE PROCESSING IN FISCAL YEAR 1999

Regional and Field Offices

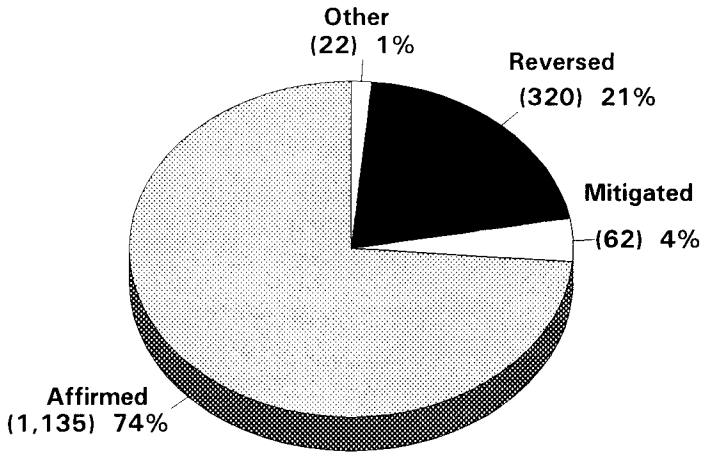
- *Case Receipts* - The regional and field offices received 7,398 new cases (initial appeals, addendum cases, and stay requests) in FY 1999—down about 5 percent from the number received in FY 1998. At the end of the fiscal year, there were 1,737 cases pending in the regional and field offices.

- *Cases Decided* - MSPB judges decided 7,669 cases in FY 1999. This number includes 6,369 initial appeals (including 7 decided at headquarters) and 1,176 addendum cases. There were 124 orders ruling on stay requests—82 in whistleblower cases and 42 in non-whistleblower cases.

- *Disposition* - Of the initial appeals decided, 3,126 (49 percent) were dismissed. Of the dismissals, 66 percent were for lack of jurisdiction, agency cancellation of the action, or appellant withdrawal of the appeal; 7 percent were dismissed as untimely; and 27 percent were dismissed without prejudice to later refiling. The accompanying charts show the outcomes of appeals that were not dismissed and the disposition of appeals adjudicated on the merits.



DISPOSITION OF INITIAL APPEALS
ADJUDICATED ON THE MERITS IN FY 1999



Based on 1,539 adjudicated initial appeals.

- *Settlement Rate* - Of the 3,243 appeals that were not dismissed, 1,704 were settled, for an overall settlement rate of 53 percent—about the same as in FY 1998. The settlement rate for performance cases was 71 percent; for adverse action cases, 67 percent; and for denials of within-grade increases, 67 percent.

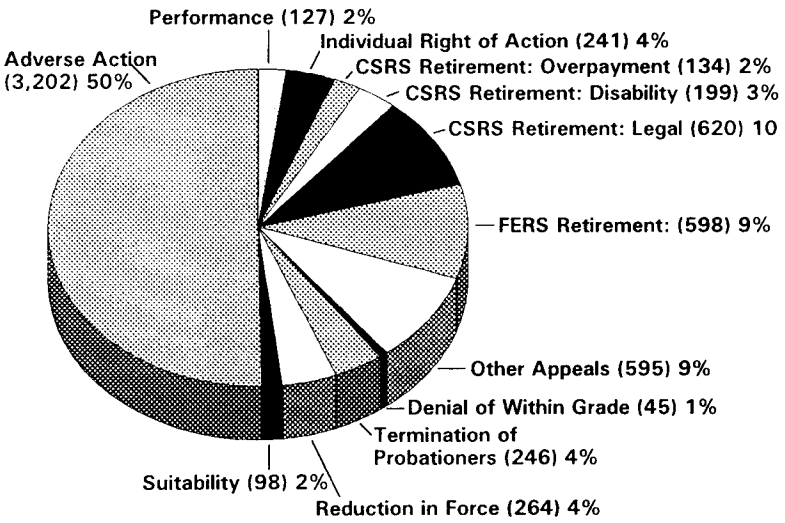
- *Relief for Appellants* - Considering the number of appeals settled (1,704) and those in which the agency action was reversed or mitigated (382), appellants received relief in 64 percent of the appeals that were not dismissed. Of the 1,539 appeals that were not dismissed or settled, 25 percent resulted in reversal or mitigation of the agency action.

- *Processing Time* - The average processing time for initial appeals and addendum cases was 100 days. Of the initial appeals decided, 83 percent were decided within 120 days.

- *Types of Actions Appealed* - Of the initial appeals decided, 50 percent were appeals of agency adverse actions, 4 percent were RIF appeals, 4 percent involved termination of probationers, and 2 percent were appeals of performance-based actions. Retirement cases (both CSRS and FERS) accounted for 24 percent of total appeals decided, and the remainder involved other types of agency actions.

- *Whistleblower Appeals* - There were 510 whistleblower appeals and stay requests decided. Of this number, 241 were individual right of action (IRA) appeals in which the appellant was required to exhaust the procedures of the Office of Special Counsel, 187 were direct appeals to the Board that included an allegation of reprisal for whistleblowing, and 82 were requests to stay an action allegedly based on whistleblowing.

TYPES OF INITIAL APPEALS DECIDED IN FY 1999



Total Number of Initial Appeals: 6,369

- *Relief for Appellants in Whistleblower Appeals* - Of the 428 whistleblower appeals decided (241 IRA appeals and 187 appeals of otherwise appealable actions), 252 (59 percent) were dismissed. In the other 176 whistleblower appeals, appellants received relief—through settlement, reversal, or mitigation—in 97 (55 percent).

- *Mixed Cases* - Allegations of discrimination were raised in 1,093 of the initial appeals decided; however, in 852 of those appeals, the discrimination issue was not decided because the case was dismissed (550) or settled (297) or the allegation was withdrawn (5). The remaining 241 mixed case appeals resulted in a finding of no discrimination in 234 (97 percent) and a finding of discrimination in 7 (3 percent).

Board Headquarters

- *Case Receipts* - At headquarters, the Board received 2,083 new petitions for review and other cases (both appellate and original jurisdiction) in FY 1999—down about 3 percent from FY 1998. At the end of the fiscal year, there were 1,076 cases pending.

- *Cases Decided* - The 3-member Board decided 2,125 cases in FY 1999. Of these, 1,748 were petitions for review of initial decisions on appeals, 191 were petitions for review of initial decisions in addendum cases, 92 were other appellate jurisdiction cases, and 94 were original jurisdiction cases. The Board also issued decisions on 17 interlocutory appeals. In addition, the Administrative Law Judge issued initial decisions in 12 original jurisdiction cases.

- *Disposition of PFRs* - Of the 1,748 petitions for review of initial decisions on appeals, 16 percent were dismissed, 3 percent were settled, and 59 percent were denied for failure to meet the criteria for review. The remaining 22 percent consisted of 14 percent granted and 8 percent denied but simultaneously reopened by the Board.

- *Outcome of PFRs Reviewed* - Of the decisions in the 393 PFRs that were granted or denied but simultaneously reopened, 27 percent affirmed the initial decision, 17 percent reversed it, and 52 percent remanded the case to the administrative judge. In the remaining 4 percent, the initial decision was vacated or the case was forwarded to a regional/field office for processing.

- *Processing Time* - The average processing time for all petitions for review (on both initial appeals and addendum cases) was 222 days.

Additional fiscal year 1999 case processing statistics, including a breakdown of appeals by agency, are contained in the Board publication, *Cases Decided by the U.S. Merit Systems Protection Board, FY 1999.*

ADJUDICATION

The Board continued to issue significant precedential decisions during fiscal year 1999, including decisions applying relatively new laws such as the Uniformed Services Employment and Reemployment Rights Act (USERRA) and earlier laws such as the Whistleblower Protection Act (WPA). The Board also issued several important decisions interpreting its jurisdiction over various matters, evidentiary requirements, and authority to award damages.

UNIFORMED SERVICES EMPLOYMENT AND REEMPLOYMENT RIGHTS ACT (USERRA)

Morgan v. United States Postal Service, 82 M.S.P.R. 1 (1999)

In this case of first impression, the Board held that a claim that an agency has discriminated against an employee because of his military service may be raised as an affirmative defense to an adverse action by the agency. The Board reasoned that a USERRA claim of discrimination because of military service comes under the category of affirmative defenses because the agency's action is allegedly not in accordance with the law. Even as a defense, rather than as a cause of action, certain general rules apply. If the appellant sought the assistance of the Secretary of Labor by filing a complaint pursuant to 38 U.S.C. § 4322 and those proceedings have not been exhausted, the Board does not have jurisdiction over the claim. The burden of proof will vary depending on whether the appellant attempts to prove the claim through direct or indirect evidence.

Bodus v. Department of the Air Force, 82 M.S.P.R. 508 (1999)

In cases involving personnel actions that are independently appealable to the Board, a claim of discrimination based on military service under USERRA is an affirmative defense, to which the appellant could add others, such as a claim of discrimination based on race or sex. In cases in which the personnel actions at issue are *not* otherwise appealable, however, the Board's authority is limited to determining whether the agency violated USERRA. USERRA claimants who believe that they have also suffered discrimination based on something other than their military service may seek redress from EEOC.

Williams v. Department of the Army, 83 M.S.P.R. 109 (1999)

The Board held that the 1998 amendment to USERRA created a cause of action for alleged violations of the Veterans' Reemployment Rights Act (VRRA), the predecessor statute to USERRA, but the amendment does not make substantive USERRA law retroactive. To read the amendment as making substantive USERRA law retroactive would impose new duties on already completed transactions. Where, as in this case, the law as it existed in 1984 contains no provision upon which the appellant could base a claim of discrimination because of his status as a veteran, the Board dismissed the appeal for failure to state a claim upon which relief can be granted.

WHISTLEBLOWER PROTECTION ACT

Roach v. Department of the Army, 82 M.S.P.R. 464 (1999)

The Board held that the denial, revocation, or suspension of a security clearance is *not* a personnel action under 5 U.S.C. § 2302 and that, even after the 1994 amendments to the WPA, the Board continues to lack jurisdiction over security clearance issues. A companion case, *Hesse v. State*, 82 M.S.P.R. 489 (1999), addressed the security clearance issue in the

context of a Chapter 75 appeal and reached a similar conclusion.

Keefer v. Department of Agriculture, 82 M.S.P.R. 687 (1999)

In this interlocutory appeal, the Board held that a disclosure, in order to be protected under the WPA, need not be so specific as to allow a recipient to conduct an investigation without having to return to the employee for additional information. Although disclosures must be specific and detailed—not vague allegations of wrongdoing regarding broad or imprecise matters—the Board may not impose additional jurisdictional requirements, such as a specificity requirement, that are not found in the statute.

McVay v. Arkansas National Guard, 80 M.S.P.R. 120 (1998)

The Board ruled that the appeal of a National Guard Technician must be dismissed for failure to state a claim upon which relief may be granted. Under 32 U.S.C. §§ 709(e)(4) and (5), a National Guard Technician may not appeal a reduction in grade and an involuntary retirement, even if raised as an IRA, beyond the State Adjutant General. A nonselection for promotion is a personnel action and its consideration by the Board is not precluded by Title 32, but no available relief would be effective because a Board order is not enforceable against the National Guard.

Dick v. Department of Veterans Affairs, 83 M.S.P.R. 464 (1999)

The Board ruled that it had jurisdiction over this IRA appeal by a Department of Veterans Affairs (DVA) health care professional, concluding that the independent personnel system under Title 38 was not an impediment. The DVA's Disciplinary Appeals Board has jurisdiction over "major adverse actions" where questions of "professional conduct or competence" are involved. If such a matter is not at issue, a personnel action that otherwise meets the WPA's requirements can be contested before the Board in an IRA appeal.

DiGiorgio v. Department of the Navy, 84 M.S.P.R. 6 (1999)

The Board ruled that allegations of wrongdoing that obviously implicate a violation of law, rule, or regulation, such as alleged fraud in claiming overtime pay, do not require an appellant to identify any particular one. In this case, the Board held that a disclosure made after the allegedly retaliatory personnel action cannot have been a contributing factor to the action.

BOARD JURISDICTION: CONSTRUCTIVE ACTIONS

Colburn v. Department of Justice, 80 M.S.P.R. 257 (1998)

A lateral transfer between agencies is appealable if it is involuntary, since it is tantamount to an involuntary retirement or resignation, which also severs the employment relationship.

Hogan v. Department of the Navy, 81 M.S.P.R. 252 (1999)

The Board clarified when it will find jurisdiction where an appellant claims that he suffered a constructive demotion as a result of a classification matter. The Board will not take jurisdiction over a constructive demotion appeal just because an employee's former position was misclassified or "should have been" upgraded; rather, it will hear such an appeal only where a classification action that is either a correction of a classification error or an application of a new classification standard is taken after the appellant's reassignment.

Peoples, et al, v. Department of the Navy, 83 M.S.P.R. 216 (1999)

The Board held that proof of intolerable working conditions compelling an employee to be absent for more than 14 days may support a finding of constructive suspension. The agency's actual or constructive knowledge of the conditions is required before any burden to alleviate them arises.

Perrine v. General Services Administration, 81 M.S.P.R. 155 (1999)

The decision restates the history of the Voluntary Separation Incentive Payment (VSIP) program and its part in the Federal workforce restructuring and downsizing. It also restates the law as to Board jurisdiction over resignation and discusses the relationship between resignation and the VSIP program. The Board concluded that a signed separation agreement to retire under the agency's buyout program was not by itself a "valid reason" to justify the agency's denial of the withdrawal request. The Board found, however, that the agency established a valid reason independent of the agreement and based on administrative disruption when it showed that it had reduced its FTE levels based on buyout commitments. The Board then examined the agency's hardship-exception policy, determined that the appellant failed to satisfy its standard of extreme hardship or extraordinary circumstances, and concluded that the agency properly denied the withdrawal request. The Board therefore lacked jurisdiction over the appellant's alleged involuntary retirement.

Ward-Ravenell v. General Services Administration, 81 M.S.P.R. 202 (1999)

In this companion case to *Perrine v. General Services Administration*, the Board reviewed the circumstances concerning the agency's buyout retirement offer and found that the appellant satisfied the agency's standard of extreme hardship or extraordinary circumstances for withdrawal of her buyout retirement commitment.

BOARD JURISDICTION: OTHER

Kelley v. United States Postal Service, 81 M.S.P.R. 38 (1999)

The Board found that effective November 18, 1997, the term "veteran" was expanded to include all individuals who served on active duty in the Armed Forces during the Gulf War, *i.e.*, between August 2, 1990, and January 2, 1992, and who were separated under honorable conditions. Under the amended law, Gulf War veterans have preference-eligible status, so long as they are not excluded from it under 38 U.S.C. § 5303A. That section excludes a veteran who first served after September 7, 1980, but did not serve either 24 continuous months on active duty or the full period for which he was called up. Because the appellant was not excluded under 38 U.S.C. § 5303A, he had standing to appeal his removal to the Board.

Shifflett v. Department of the Navy, 83 M.S.P.R. 472 (1999)

A demotion resulting from a reclassification entitling an employee to retained grade and pay under 5 U.S.C. Chapter 53 is not appealable as an adverse action, but a reclassification due to a reorganization is appealable as a reduction-in-force demotion, even if the reclassification was made in delayed recognition of a reorganization that occurred long before it.

Von Zemenszky v. Department of Veterans Affairs, 80 M.S.P.R. 663 (1999)

The Board ruled that health-care professionals in the Department of Veterans Affairs' Veterans Health Administration (VHA) are covered by the government-wide reduction in force (RIF) regulations promulgated by the Office of Personnel Management, and that such employees have the right to appeal RIF actions to the Board. The agency had eliminated positions in the VHA without following the government-wide RIF rules and, instead, followed its own internal rules. It argued before the Board that the government-wide rules did not apply because Congress intended for the VHA to have an independent personnel system. The Board disagreed, finding that the VHA is covered by the unambiguous language of the statutes and regulations governing RIFs, 5 U.S.C. §§ 3501-3504 and 5 CFR Part 351. The Board acknowledged that some aspects of the VHA personnel system, such as discipline, are not covered by the laws and rules generally applicable to Executive Branch employees, and found insufficient indication that Congress also intended to exempt the VHA from the Executive Branch RIF system.

ADVERSE ACTIONS: LEAVE-RELATED

Burge v. Department of the Air Force,
82 M.S.P.R. 75 (1999)

The Board held that under the Family and Medical Leave Act (FMLA), a Federal employee's late submission of medical documentation may be allowed where timely submission "is not practicable under the particular circumstances .... despite the employee's diligent, good faith efforts." When a Federal employee requests leave under the FMLA, an agency is required to provide "guidance concerning the employee's rights and obligations." The agency may request administratively acceptable evidence but may not apply a more restrictive leave policy than the law does. In determining whether a Federal employee's untimely medical certification must be accepted by an agency, the Board adopted the same standard that applies to the private sector and the Postal Service.

Moore v. United States Postal Service,
83 M.S.P.R. 533 (1999)

The agency found the appellant ineligible for FMLA leave on the ground that he had not served the statutorily-required 1,250 hours of employment in the year preceding the leave request. The agency had removed the appellant, and although the Board had reversed that action on appeal, the agency treated his absence from the rolls as disqualifying him from FMLA coverage. The Board disagreed. Under the Back Pay Act (5 U.S.C. § 5596(b)(1)(B)), an employee "for all purposes, is deemed to have performed service for the agency during that period" for which he received back pay. That broad provision deeming an employee to have worked encompasses the service requirement for eligibility for FMLA leave.

DISCRIMINATION-RELATED ISSUES

Lamberson v. Department of Veterans Affairs, 80 M.S.P.R. 648 (1999)

A disability retirement award under CSRS or FERS does not automatically bar an appellant from alleging that a removal was discriminatory because of the agency's failure to accommodate that disability. The Board will employ a case-by-case approach in determining the effect of an application for or receipt of a disability retirement award upon a claim of disability discrimination.

Weslowski v. Department of the Army, *80* M.S.P.R. 585 (1999)

An appellant may not raise a discrimination claim for the first time on petition for review of an administrative judge's decision if he had sufficient knowledge of facts and circumstances, while the appeal was pending before the administrative judge, to form a reasonable suspicion that discrimination had occurred. His responsibility to raise the issue is triggered when he has sufficient facts to reasonably suspect discrimination, even before all of the facts that would have supported a charge of discrimination have become apparent.

EVIDENTIARY MATTERS

Christofili v. Department of the Army,
81 M.S.P.R. 384 (1999)

The Board ruled on interlocutory appeal that an appellant may obtain the disclosure of relevant information from an agency and its employees through any lawful means, in addition to the Board's discovery procedures. Sanctions, which may be imposed if a party has failed to exercise due diligence or has exhibited negligence or bad faith in its efforts to comply with Board regulations or a judge's order, are not warranted where a party uses lawful means other than the Board's discovery procedures to gain information. The Board also concluded that it has no authority to enforce a State's Rules of Professional Conduct against an attorney representative in its proceedings.

Gregory V.. *Federal Communications Commission*, 84 M.S.P.R. 22 (1999)

To support a claim of witness intimidation by an agency official's presence at a hearing, an appellant must show that the administrative judge's error in controlling the proceedings denigrated her substantive rights and

that the official threatened the witness with adverse consequences or suggested that the witness either not testify or not testify truthfully.

Sapp v. United States Postal Service, 82 M.S.P.R. 411 (1999)

Federal employee witnesses are in official duty status when appearing at a Board hearing and are entitled to pay and benefits including travel and per diem for that time under 5 CFR 1201.33, but no comparable regulation exists with regard to a grant of official time for otherwise pursuing an appeal. An appellant's non-attorney representative, even if a Federal employee, is not entitled to official time to pursue representation nor is he entitled to be paid for the time he spent representing her because there was no attorney-client relationship.

MISCELLANEOUS TOPICS

Reid v. United States Postal Service, 80 M.S.P.R. 405 (1998)

An appellant who is otherwise entitled to a compensatory damages award may receive such damages for medical services paid by his health insurer. The Board based its decision on the collateral source rule, which provides that benefits received by the plaintiff from a source collateral to the defendant may not be used to reduce that defendant's liability for damages.

Kinney v. Department of Agriculture, 82 M.S.P.R. 338 (1999)

The Board ruled on interlocutory appeal that it does not have authority under the WPA to award monetary damages for nonpecuniary harm, such as emotional or mental distress. The Board noted that 5 U.S.C. § 1221(g)(1)(A)(ii) authorizes consequential damages for whistleblower reprisal by specifying the Board's authority to award "back pay and related benefits, medical costs incurred, travel expenses, and any other reasonable and foreseeable consequential damages." The Board applied the statutory construction rule requiring that a general statutory term be understood in light of the specific terms that surround it and that a catchall phrase be read as applying only to categories similar to those specifically enumerated (*ejusdem generis*). The Board noted that, unlike the WPA, the legislative history of the Civil Rights Act of 1991 made clear that damages for nonpecuniary harm were intended. It also noted that waivers of sovereign immunity must be interpreted narrowly in favor of the Government.

Farquhar v. Department of the Air Force, 82 M.S.P.R. 454 (1999)

Compensatory damages are not available for claims of age discrimination or reprisal for making a charge, testifying, assisting, or participating in an investigation, proceeding, or hearing that is not under Title VII.

Bracey & Wilson v. Office of Personnel Management, 83 M.S.P.R. 400 (1999)

In this precedential decision on entitlement to disability retirement, the Board held that a light-duty assignment is considered a "position" under the CSRS and FERS regulatory definitions of "disabled," "accommodation," and "vacant position," even when that assignment does not constitute an "established position" in the employing agency. The Board further held that if an employee covered by CSRS or FERS cannot perform the duties of his or her position of record or any "established position" in the employing agency, a light-duty assignment is an "accommodation" under the governing regulation that disqualifies the individual from receiving disability retirement.

Haebe v. Department of Justice, 81 M.S.P.R. 167 (1999)

In addition to restating several general rules regarding interim relief, the Board reviewed the legislative history of the relevant provision of the Whistleblower Protection Act and found that Congress did not intend that agencies meet a higher standard when complying with an interim relief reinstatement order than when complying with a final relief reinstatement order. Accordingly, the Board held that, even absent an explicit undue disruption determination, the exception to the rule that an employee must be reinstated to the position from which he was removed applies in interim relief, as well as in final relief situations, where the agency establishes that it had a "strong overriding

interest" or "compelling" reasons for placing him in a different position. The Board found that the agency met that test here based on its decision that it did not want the appellant, a DEA Criminal Investigator, to testify in a criminal proceeding.

In a companion case, *Purzycki v. General Services Administration*, 81 M.S.P.R. 188 (1999), the Board found that the agency met the "strong overriding interest" or "compelling" reasons test based on the application of its usual policy of management rotation, which had resulted in another employee's placement in the appellant's position upon his resignation.

Morgan v. Department of Energy, 81 M.S.P.R. 48 (1999)

The Board addressed for the first time the applicability of the 1998 amendment to the Back Pay Act. Under the amended statute, an award of back pay upon an administrative determination that a personnel action was unwarranted or unjustified cannot be made for a period of greater than six years before the date of filing a timely administrative appeal or, absent a timely filing, six years before the date of the administrative determination. Pub. L. No. 105-261, 112 Stat. 1920 (Oct. 17, 1998). The Board stated that there was a question as to whether the statutory amendment should apply retroactively, *i.e.*, to an appeal from a personnel action taken prior to the amendment, but found it unnecessary to resolve the issue because the back pay award in the instant appeal covered only a five-year period ending on the date that the appeal was timely filed.

ACCOMPLISHMENTS IN ADJUDICATION

Alternative Dispute Resolution

The Board has expanded its use of alternative dispute resolution (ADR) to provide settlement opportunities at earlier and later stages of an employment dispute. Although settlement of over 50 percent of initial appeals continues as a significant part of its ADR program, the Board has made new opportunities for settlement available. During FY 1999, the Board changed its regulations to make sure Board time frames for filing do not impede the parties getting together to resolve a personnel dispute. The Board amended its regulations to allow an automatic 30-day extension of the regulatory time limit for filing an appeal where the parties mutually agree in writing to engage in alternative dispute resolution prior to coming to the Board for a formal resolution of the dispute (64 *FR* 27899, May 24, 1999).

The Board took a look at the early stages of a personnel dispute—while a matter is still at the agency level—to see if an early intervention ADR program will help agencies and employees resolve employment disputes before litigation is an issue. This resulted in the Board's initiation of a training program to develop a cadre of knowledgeable and skilled specialists who can intercept employee disputes before appeals are filed with the Board. The first training session for Certified Dispute Resolution Specialists was held in September 1999. The program, limited to 60 participants, was fully subscribed and applicants were turned away. Participants were to take a look at their agencies, identify problems or barriers to ADR, initiate actions to resolve issues, and try to get some success in acceptance of ADR in personnel matters. The willingness of agencies to send employees to be trained as Certified Dispute Resolution Specialists suggests that early intervention has great potential.

The Board's extension of its ADR program to cases decided by the three Board members (petitions for review (PFRs)) has also proved a valuable alternative to litigation. The PFR Settlement Program achieved a 27 percent rate of success in appeals where settlement was attempted at the headquarters level in FY 1999. Considering that settlement had already been discussed at the regional or field office level to no avail in nearly all of those cases, the Board's customers and observers were often surprised to learn of this significant rate of success. In addition, the settlement efforts themselves—successful or not—furthered customer service. *Pro se* appellants and other parties regularly conveyed their gratification with the settlement process as a vehicle to promote better understanding of both the adjudicatory process and the law as applied to their cases.

The Board has adopted an ADR agency-wide policy that recognizes formally the

importance of resolving disputes—including those in which MSPB is involved as a party—without litigation. The Board's policy implements the provisions of the Administrative Dispute Resolution Act and the Presidential Memorandum of May 1, 1998, implementing that Act.

For FY 2000, the Board has instituted a trial case processing experiment involving the suspension of case processing in order to allow the parties additional time to engage in discovery or settlement.

Videoconferencing

The Board's revolution of the hearing process through videoconferencing continues to please parties and helps the Board meet its adjudication responsibilities. Last year, the Board's administrative judges held 128 video hearings—over twice as many as in FY 1998 (61 hearings). The Board also uses the video conferencing equipment for video testimony, prehearing conferences, and settlement discussions. Administratively, MSPB offices use the equipment to hold multi-office staff meetings, training sessions, and employment interviews. This new way of doing business is now a regular part of MSPB operations and allows the Board to avoid costly and time consuming travel by judges, parties, and other Board employees.

Bench Decisions

The Board's bench decision project, which authorizes administrative judges to announce decisions immediately following a hearing, continues to be an effective adjudicative tool. After issuing an oral decision, the administrative judge documents this decision in a brief written decision that is provided to the parties shortly after the hearing. The bench decision initiative is intended to provide parties with a decision more quickly and generally speed the decision-making process of the Board. The Board's judges issued over 80 bench decisions in FY 1999.

Board Procedures

The Board is working on plans to test electronic filing of case documents through e-mail addresses posted on the Board's Web site and increased distribution of Board decisions in electronic form.

In FY 1999, the Board implemented a pilot program in the Office of the Clerk, similar to the system now used in many Federal courts, that authorizes the Clerk to "filter" certain cases by identifying plainly deficient PFRs and/or PFRs that are procedurally deficient or not within the Board's purview. In such cases, proposed short-form Orders are drafted by attorneys in the Clerk's office and forwarded directly to the Board rather than to the Office of Appeals Counsel for further review. The focus of the pilot is on PFRs that are: (1) patently non-meritorious or otherwise fail to prosecute an appeal; (2) procedurally deficient where the party fails to respond to a deficiency notice or fails to make a filing in response to a deficiency notice; (3) not within the Board's purview; and (4) untimely with no attempt to show good cause. The Clerk estimates that approximately 4 to 8 percent of PFRs can be handled through this process annually.

Adjudicatory Regulations

In May 1999, the Board amended its interim relief regulations regarding what an agency must show when it files a PFR of an initial decision that includes an interim relief order (64 *FR* 27899-27901, May 24, 1999). The intent of the change is to reduce the number of PFRs dismissed on technical grounds, thus allowing the Board to reach the merits of the case.

Shortly after the end of the fiscal year, the Board published final regulations for the processing of USERRA appeals (64 *FR* 54507-54508, October 7, 1999).

ACCESS TO MSPB ADJUDICATORY PROCEDURES AND DECISIONS

Additional information on the Board's procedures is available in its publications, *An Introduction to the MSPB*, *Questions & Answers About Appeals*, and *Questions & Answers About Whistleblower Appeals*. These publications were revised and updated in 1999.

Final Board decisions are published by commercial publishers, including West Publishing Company (*United States Merit Systems Protection Board Reporter*), Labor Relations Press (*Federal Merit Systems Reporter*), and Information Handling Services (*PERSONNET*). All citations to Board decisions in this report are to the West's publication.

Final Board decisions, weekly summaries of significant decisions, the Board's information publications, the MSPB Appeal Form, and the MSPB PFR Form are available on the Board's World Wide Web site at *www.mspb.gov*.

LITIGATION

JUDICIAL REVIEW AND LITIGATION

Final Board decisions in both appellate and original jurisdiction cases are subject to judicial review by the United States Court of Appeals for the Federal Circuit. There are two exceptions: (1) decisions in mixed cases involving allegations of discrimination; and (2) decisions in Hatch Act cases involving State or local government employees. These cases may be appealed to an appropriate U.S. district court.

The Director of OPM may petition the Board for reconsideration of a final decision and may also seek judicial review of a final Board decision that the Director determines will have a substantial impact on a civil service law, rule, regulation, or policy.

During fiscal year 1999, the U.S. Court of Appeals for the Federal Circuit issued decisions on review of 403 final Board decisions and left the Board decision unchanged in 93 percent of those.

The Whistleblower Protection Act of 1989 granted the Board litigating authority to defend its appellate decisions except where the merits of the underlying personnel action or a request for attorney fees is at issue. In addition, the Board is a respondent in all cases in which the Director of OPM seeks judicial review of a Board decision. The Board also litigates appeals from Board decisions in cases brought by the Special Counsel. The Board was responsible for litigating 109 cases in the Federal Circuit during the fiscal year.

Other active litigation includes discrimination cases filed in various Federal district courts when the Board is a defendant; cases in which the Board intervenes; cases where Board employees are sued in their personal capacities for actions taken by them within the scope of their employment; administrative litigation arising out of appeals to MSPB filed by the Board's own employees; and cases brought by the Board to enforce subpoenas issued by the Office of Special Counsel and the Board's administrative judges.

The Office of the General Counsel monitors cases involving appeals from decisions issued by the Board under its appellate jurisdiction. The employing agency is the named respondent in these cases and is defended by the Department of Justice. Board activities in connection with monitored litigation include responding to inquiries from the parties or the court, informing the Board of significant cases scheduled for argument or decision by the court, and preparing summaries of published decisions. During FY 1999, attorneys in the Office of the General Counsel monitored 637 cases, including both new filings with the court and cases carried over from the previous year.

FEDERAL CIRCUIT

Carr v. Social Security Administration, 185 F.3d 1318 (Fed. Cir. 1999)

The court adopted the Board's test in *Geyer v. Department of Justice*, 70 M.S.P.R. 682, *aff'd*, 116 F.3d 1497 (Fed. Cir. 1997) (Table), for determining whether an agency has shown by clear and convincing evidence that it would have taken the same personnel action in the absence of the employee's whistleblowing. The *Geyer* factors are: (1) the strength of the agency's evidence in support of its personnel action; (2) the existence and strength of any motive to retaliate on the part of agency officials who were involved in the decision; and (3) any

evidence that the agency takes similar actions against employees who are not whistleblowers but who are otherwise similarly situated.

Carrier v. Merit Systems Protection Board, 183 F.3d 1376 (Fed. Cir. 1999)

The court held that the Board does not have jurisdiction over an appeal by a nonpreference eligible Postal Service employee who fails to establish that, as a matter of law, his work assignments precluded him from membership in a bargaining unit. In a clarification of its decision in *McCandless v. Merit Systems Protection Board*, 996 F.2d 1193 (Fed. Cir. 1993), the court emphasized that this is true even where an employee is not a member of a bargaining unit.

This case concerned a Postal Service employee who was not a preference eligible but who asserted that he had appeal rights under 39 U.S.C. § 1005(a)(4)(A)(ii), which permits appeals by Postal Service employees who are supervisors, management employees, or employees engaged in confidential personnel work. The Board found that Mr. Carrier did not prove he was a manager or supervisor and that he had waived an opportunity to prove he was a confidential-personnel employee, and therefore dismissed his appeal for lack of jurisdiction. The court affirmed, rejecting Mr. Carrier's contention that the Board had jurisdiction over his appeal because his position was described as a nonbargaining unit position and there may presently be no bargaining unit in existence that he could join.

Costello v. Merit Systems Protection Board, 182 F.3d 1372 (Fed. Cir. 1999)

In this disciplinary action, which the Office of Special Counsel had filed with the Board, the court reversed the Board's finding that Mr. Costello had violated the WPA, concluding that the primary focus in determining whether Mr. Costello acted in retaliation because of the protected disclosures of a subordinate employee, Mr. Steen, should be on the basic disclosure, not its subsequent repetition. The court found that the 2-year gap between the initial disclosures and the allegedly retaliatory action was too long an interval to justify an inference of cause and effect between the two, especially considering that Mr. Costello transferred Mr. Steen only after receiving a draft report recommending such a transfer. The court concluded that the fact that the disclosures were made before Mr. Costello joined the agency and the lack of any documented reason why Mr. Costello would have wanted to punish Mr. Steen for whistleblowing that was not directed against Mr. Costello (but against another employee whom Mr. Costello was not shown to have favored) all pointed against retaliation.

The court also held that the Board, not the Special Counsel, is the proper respondent in a case in which the Board's exercise of its original jurisdiction is challenged. The personnel action being challenged here was the Board's decision that Mr. Costello committed the charged violations and that a penalty was warranted. In this circumstance, the court concluded that the Board was the agency whose action Mr. Costello was challenging.

Hatley v. Department of the Navy, 164 F.3d 602 (Fed. Cir. 1998)

Mr. Hatley was removed from his position as a firefighter for failure to comply with requests for random drug testing. The Board affirmed the action on appeal. The court held that the agency's random drug testing program was not an unreasonable search and seizure prohibited by the Fourth Amendment, concluding that the Government's interest in keeping firefighters free of drugs outweighed Mr. Hatley's expectation of privacy. The court agreed with Mr. Hatley that the collection of urine for drug testing is within the protection of the Fourth Amendment and that programs involving random drug testing of employees must be evaluated for reasonableness in their circumstances. To determine reasonableness, the court weighed the intrusion into Mr. Hatley's privacy against the public interest in the agency's drug testing program. The court noted that employees who are responsible for the safety of others generally may be subject to drug testing, even in the absence of suspicion of wrongdoing. In addition, the court rejected Mr. Hatley's arguments that the drug testing program violated the Fifth Amendment and the United Nations' Universal Declaration of Human Rights.

Lachance v. Devall, 178 F.3d 1246 (Fed. Cir. 1999)

In this case brought by the Director of OPM, the court held that the Board may not independently determine penalties, even if the Board does not sustain all of the charges upon which the agency's penalty was based. The court held that when the Board sustains all of an agency's charges, the Board may mitigate the agency's original penalty to the maximum reasonable penalty when it finds that the original penalty was too severe. Similarly, when the Board sustains fewer than all of the agency's charges, the Board may mitigate to the maximum reasonable penalty unless the agency has indicated either in its final decision or during the proceedings before the Board that it would have imposed a lesser penalty (than the maximum reasonable penalty) for fewer charges.

Lachance v. White, 174 F.3d 1378 (Fed. Cir. 1999)

The court held that the proper test in a whistleblower appeal for determining whether the employee had a reasonable belief under 5 U.S.C. § 2302(b)(8) that he uncovered gross mismanagement is "whether a disinterested observer with knowledge of the essential facts known to and readily ascertainable by the employee could reasonably conclude that the actions of the Government evidence gross mismanagement." The court held that while the Board's consideration of whether the employee was familiar with the alleged improper activities and whether his belief was shared by similarly situated employees may have some relevance, these facts are insufficient in themselves to show that the whistleblower had a reasonable belief that he disclosed gross mismanagement. When considering such evidence, the Board should consider the personal bias and self-interestedness of the putative whistleblower and his similarly situated supporters. The court stated further that review of a whistleblower's disclosures should begin with the presumption that public officers perform their duties correctly, fairly, in good faith, and in accordance with the law and governing regulations unless there is " 'irrefragable proof' to the contrary" (citation omitted). The court remanded the case to the Board for application of the proper test.

Stone v. Federal Deposit Insurance Corporation, 179 F.3d 1368 (Fed. Cir. 1999)

In this case involving the removal of an employee on disciplinary charges, the court held that an employee's constitutional due process guarantee of notice (both of the charges and of the employer's evidence) and an opportunity to respond is violated when a deciding official receives new and material information through an *ex parte* communication. On remand, the Board is to examine the circumstances of the particular case and determine whether *ex parte* contacts provided new and material information. Among the factors that the Board should weigh are whether the *ex parte* communication introduces "cumulative" information or new information; whether the employee had a chance to respond to it; and whether the *ex parte* communications were of the type likely to result in undue pressure upon the deciding official to rule in a particular manner. Ultimately, the inquiry of the Board is whether the *ex parte* communication is so substantial and so likely to cause prejudice that no employee can fairly be required to be subjected to a deprivation of property under such circumstances. The court noted that such a violation of procedural due process is not subject to the harmless error test.

Martin v. Department of the Air Force, 184 F.3d 1366 (Fed. Cir. 1999)

The court held that if a wrongfully discharged employee is unable to work because of an accident or illness closely related or due to his interim employment or arising because of the unlawful discharge, the period of disability should be included in the back pay period. Mr. Martin was injured while working at an interim job during the period between his removal from the agency and his subsequent reinstatement pursuant to a Board decision. As a result of his injury, Mr. Martin received State workers' compensation benefits. The agency informed him that he would not be given back pay for the period of time he was receiving workers' compensation benefits because he had been unable to work during that time period. The court held that denying an employee back pay for a period of disability without looking at the cause of the disability was an unreasonable interpretation of the Back Pay Act, 5 U.S.C.

§ 5596 (1994), and was also inconsistent with causation analysis that has been required under similar statutory back pay provisions, such as those in the National Labor Relations Act and Title VII of the Civil Rights Act of 1964. The court found that Mr. Martin's injury was closely related to the nature of his interim employment, and concluded that he should be awarded back pay for the time lost due to the work-related injury. The court remanded the case to the Board so that it could consider Mr. Martin's settlement in a parallel civil suit in calculating his net back pay award, noting that only that portion of the settlement agreement attributable to lost wages should be offset against his back pay award.

OTHER COURTS

Alexander v. Merit Systems Protection Board, 165 F.3d 474 (6th Cir.), cert. denied, 67 USLW 3654 (1999)

The court affirmed a U.S. District Court decision that affirmed the Board's decision finding that Mr. Alexander, a State employee, had violated the Hatch Act and directing the State agency to either remove him or forfeit receipt of Federal funds equal to two years of his pay. The Hatch Act requires the Board to remove a Federal employee found to have violated the Act from his position, unless the Board unanimously determines that removal is not warranted, in which case the Board must order a penalty of not less than a 30-day suspension. In contrast, the Board may order the removal of a State employee who violates the Act, but if the Board determines that the violation does not warrant removal, the Board may impose no other penalty. The court rejected the claim that the Hatch Act discriminates against State employees, noting that the law provides a single standard for determining whether a Hatch Act violation warrants removal in both Federal employee and State employee cases. Thus, State employees are treated more favorably than Federal employees under the Act because they are not penalized for violations that do not warrant removal, whereas Federal employees are penalized for every violation. The court determined that the Federal Government's interest as employer in promoting Government effectiveness, fairness, and the merit system in Federal employment provides a rational basis for treating Federal and State employees differently under the Hatch Act. The court also held that the Board has not applied the Hatch Act more harshly against State employees than against Federal employees.

The U.S. Court of Appeals for the Federal Circuit maintains a Web site at *www.fedcir.gov*, which provides quick access to two other Web sites that make the court's decisions available.

STUDIES

THE STATUTORY STUDIES FUNCTION

In addition to its adjudicatory functions, the Board has statutory responsibility for reviewing the significant actions of OPM and for conducting studies of the civil service and other merit systems in the Executive Branch. The studies function complements the Board's adjudicatory activities by reviewing Federal human resources management policies and practices on a systemic basis. As an independent agency, the Board is uniquely qualified to provide neutral, nonpartisan reviews as part of the ongoing effort to assess, develop, and maintain an effective and efficient civil service.

The Board typically solicits potential study topics from a wide variety of sources in developing its OPM oversight and studies agenda. The Board's studies are usually governmentwide in scope. The Board also works with three standing panels—Federal managers, human resources management specialists, and union representatives—who are surveyed on emerging civil service and workforce issues. The standing panel format gives the Board the ability to obtain data quickly on specific issues to meet the needs of agencies and Congress. Data for the longer studies are collected through a variety of techniques including mail and telephone surveys, on-site systems reviews, interrogatories addressed to agencies, formal discussions with subject matter experts, computer-based data analysis, and reviews of secondary source materials.

The Board's reports are submitted to the President and the Congress, as required by law. The reports are also made available to a large audience of Federal agency officials, employee and public interest groups, labor unions, academicians, and other individuals and organizations with an interest in public personnel administration. The reports and other published material are now widely available through the Internet, both at the Board's own Web site and at Government and private web sites that feature links with the Board's Web site as a service to their customers.

REPORTS ISSUED IN FY 1999

The Role of Delegated Examining Units: Hiring New Employees in a Decentralized Civil Service (August 1999): In the mid-1990s, the Office of Personnel Management delegated to agencies the authority to examine applicants for virtually every position in the competitive civil service. This decentralization of examining authority reflected the desire of Congress and the Administration to make the hiring process faster and less bureaucratic. As a result of this decentralization, activities related to the competitive hiring of new employees are now generally performed by agency human resources employees working in the Government's 650 delegated examining units (DEUs). This report presents the findings of the Board's study of the Federal Government's delegated examining units.

In reviewing how delegated examining units operate, the Board found that the units perform two essential tasks: publicizing the existence of vacant positions, and assessing applicants to identify the best candidates to refer to selecting officials for employment consideration. Most of the assessments are done either by evaluating the education and experience of applicants in relation to predetermined evaluation criteria (referred to as case examining), or by administering written tests.

Interviews with the heads of 70 randomly-selected DEUs revealed a widespread belief that delegated examining has eliminated the major difficulties associated with centralized hiring, *i.e.*, the length of time it took to get candidates referred from OPM, and the poor quality or unavailability of OPM-referred candidates. Over 80 percent of the DEU officials interviewed for the study said that delegated examining enables them to hire high-quality candidates in a reasonable period of time, and nearly 80 percent said that delegated examining is faster and more effective than centralized hiring.

Despite these generally positive views, officials in DEUs with heavy workloads saw some serious problems with the system. For example, these officials believe that case examining frequently fails to place the best qualified candidates on DEU certificates and that this is unfair to job candidates and selecting officials.

The DEU officials also said that DEU referral certificates frequently provide supervisors with too few candidates. This is caused, in part, by a law known as the "Rule of Three," which requires managers to select from among the top three available candidates. The report observed that limiting selecting officials' choice to the top three candidates on a referral list might be logically supportable if the assessment tools used were capable of precisely identifying the best three candidates. However, such fine distinctions usually cannot be made on the basis of case examining or even on the basis of written tests.

Another concern expressed by many DEU officials was that the usefulness of the referral certificates is limited by the common practice of allowing significant numbers of current Federal employees to apply for the same job not only under internal merit promotion procedures, which are limited to current Federal employees, but also under DEU postings which are open to members of the public. Frequently, these employees are included on both DEU and merit promotion certificates, which decreases the number of new people a supervisor can consider bringing into Government.

The report offers several recommendations to make delegated examining work better and improve the process for hiring new employees from outside Government: (1) Congress and OPM should take action to make written tests readily available to agencies; (2) as long as case examining remains widespread, agencies should commit sufficient resources to DEUs to ensure high-quality assessments; (3) the Rule of Three should be modified to allow supervisors to consider a greater number of qualified applicants; (4) agencies and OPM should amend their delegated examining agreements to eliminate consideration of candidates under both merit promotion and external DEU postings; and (5) agencies should provide selecting officials with more information on hiring rules and processes, particularly with respect to hiring from outside Government.

Federal Supervisors and Poor Performers (July 1999): This is the second in the Board's "Perspectives" report series, which examines human resources issues from the broad viewpoint provided by the Board's growing body of research. Reports in this series derive their conclusions from the Board's research reaching back throughout its existence, rather than relying exclusively on data collected specifically for an individual project.

This Perspectives report discusses the incidence of poor performance in the Federal workplace from the viewpoint of employees and supervisors who have responded to various MSPB surveys. It also looks at what supervisors do about poor performers, the effects of supervisors' actions, and the factors that influence supervisors' decisions about how they will handle inadequate performance.

In evaluating the study findings, the Board concluded that:

- The percentage of Federal Executive Branch workers whose performance is unacceptable is very low, and those who do not perform adequately often can be rehabilitated. The Government's measure of success in dealing with performance problems is not and should not be simply the number of employees it fires.

- Rather than ignoring poor performance, most Federal supervisors who face this problem do take some type of action—typically informal action such as counseling or coaching—to deal with it. Nevertheless, Federal employee surveys and other indicators over at least 18 years suggest that most employees, including supervisors themselves, judge this response to poor performance to be inadequate.

- While it is popular to blame failures in performance management on inadequate supervisors or the Government's system for dealing with poor performers, the problem is actually much more complicated. In addition to the law and regulations, the problem is influenced by organizational cultures, top management's level of support for supervisors' performance proposals and decisions, how the Government selects employees, and the factors emphasized in selecting supervisors.

- Because the issues are so complicated, a straightforward approach such as rewriting the law or demanding that supervisors "get tough" will not solve the problem. What is needed is a multi-faceted approach that takes into account the complex nature of the problem.

The report suggests that Federal policy officials and others with an interest in developing a more effective response to the problem of poor performance should consider the following: (1) Instead of focusing so much on the technical expertise of supervisory candidates, Federal agencies should seek candidates for supervisory jobs who have an aptitude for the human relations aspects of supervisory work; (2) agency leaders should assess the organization's internal environment to make sure they have not inadvertently created incentives and disincentives that result in poor performance being tolerated by supervisors; (3) agencies should not embellish the systems and procedures the law requires in ways that make it more burdensome to take action against poor performers; (4) agencies, with the input of their employees, should develop modifications to the current procedures to avoid costly, time-consuming, and potentially disruptive formal actions; and (5) in the interest of preventing performance problems, agencies should examine the methods they use to select nonsupervisory employees and the degree to which those methods result in good matches of people and jobs.

ADDITIONAL STUDIES COMPLETED

The studies staff also completed work in FY 1999 on the following studies, which are scheduled to be released in FY 2000: (1) "Restoring Merit to Federal Hiring: Why Two Special Hiring Programs Should Be Ended," which examines the appropriateness in the current environment of two hiring authorities—the Outstanding Scholar authority and a non-competitive Bilingual/Bicultural authority that are the result of a consent decree that is now 18 years old; (2) "Competing for Federal Jobs: Job Search Experiences of New Hires," which recounts the experiences of candidates who were hired for Federal jobs using competitive procedures and who responded to a MSPB survey; and (3) "Transition Programs for Displaced Federal Employees: A More Permanent Approach Needed," which evaluates the effectiveness and efficiency of Government programs that are intended to help displaced Federal employees find new jobs.

OTHER ACTIVITIES

Issues of Merit. In addition to reports of its studies and reviews, the Board produced four issues of its periodic newsletter, "Issues of Merit," during fiscal year 1999. This publication uses a concise, informal format to disseminate to a wide audience findings, analyses, and recommendations drawn from Board research. The topics covered during the fiscal year included:

- Balancing merit system requirements with managers' need to fill jobs quickly;

- Outstanding scholar hiring authority;

- Dealing with poor performers;

- Government managers and human resources management competencies;

- Motivating factors for public employees;

- Human resources decisions and strategic planning;
- Hatch Act;
- Temporary workforce;
- Leadership in human resources management;
- Due process for Federal workers;
- Flexible work schedules and Federal supervisors; and
- Government vacancy announcements.

Outreach and Research Support. The studies staff continued in FY 1999 to conduct outreach activities such as conference presentations and contributions to various HRM or public administration publications and forums. In addition, the staff provided data and analyses to the National Academy for Public Administration (NAPA) for its project on entry-level hiring into the Federal civilian service. The project was sponsored by a consortium of Federal agencies that included the major Executive departments and a number of independent agencies. The Board's studies staff assisted NAPA with survey sampling and statistical evaluation of survey results, and provided peer reviews of the resulting draft report.

ADMINISTRATION

INFORMATION TECHNOLOGY

During FY 1999, the Board continued its initiative to take advantage of recent improvements in information technology and to move toward the goal of greatly reducing the paperwork movement and storage involved in adjudicating appeals. It has laid the foundation for implementing an integrated document management and workflow system by implementing the design phase of a "paperless" system built around imaged documents and electronic case records. As this system comes into full development over the next several years, MSPB customers will benefit from the increased efficiency and responsiveness that will come from having much of the adjudicatory process computerized.

The Board determined that there are 10 to 12 categories of work that would be improved by being integrated into a single computerized system. These categories include the way that the Board accepts and stores documents from the parties appearing before it, as well as the manner in which the Board generates and distributes its own documents both internally and to the public. The entire system is being designed in consideration of the anticipated requirements of directives from the National Archives and Records Administration regarding electronic records and e-mail retention.

The Board's electronic filing pilot project with the Federal Circuit has established the feasibility of such a paperless process. The first case selected, *Lachance v. White and MSPB*, involves a Board interpretation of a whistleblower law. The mechanism for filing is to post documents to an Internet site. Participating attorneys have passwords to access the site. Once posted by the court, documents may be downloaded for review. This pilot to develop the process and test it is an important first step in adapting it to the Board adjudicatory process.

COMPUTER SYSTEMS

During FY 1999, the Board expanded its electronic databases to every aspect of MSPB work. The databases now cover directives (manuals, orders, and notices), other publications of broad interest (such as proposed and final regulations, legislation, OPE reports, newsletters, and press releases), financial information previously circulated in paper reports, an agency locator, and conference room reservations. MSPB employees regularly exchange work products electronically, edits are done on electronic files, and many documents are now stored electronically.

The Board also changed its network to provide a structural framework for the integrated document management and workflow system. Several servers were added to the network for new software applications and databases, server software was upgraded to provide additional manageability, and the transition to Sprint from AT&T as part of FTS2001 was begun.

YEAR 2000 COMPLIANCE

Over two and one-half years of planning, testing, and modifying MSPB equipment brought the Board to readiness for the Year 2000. MSPB upgraded most equipment and software. It upgraded operating system software and database software on the minicomputer and servers to new releases, modified applications systems to support a 4-character year, and upgraded office PC's and software where needed. In further testing its systems for Y2K compliance, in 1999 the Board identified new problems with the

telecommunications system that required correction. With Y2K supplemental funds, the Board installed new telephone systems at the headquarters offices as well as in several of the regional and field offices. These systems were certified as Y2K compliant.

HUMAN RESOURCES CROSS SERVICING

MSPB revolutionized its traditional way of handling internal personnel functions—turning to an outside entity to provide human resources services. This ended a 20-year practice of providing human resources services with an in-house staff. The Board entered into a cross-servicing agreement with the Department of Agriculture's Animal and Plant Health Inspection Service (APHIS) at the end of fiscal year 1998 to receive human resources services. The first year of operation under the interagency agreement proved successful. MSPB has reduced its human resources staff from a high of 14 a few years ago to 1 personnelist during fiscal year 1999, an estimated savings of about $700,000 per year. This savings is being redirected to adjudicating appeals and reducing the size of the backlog of pending cases. Under the agreement, MSPB managers have easy access to APHIS' staff of extremely knowledgeable and readily available specialists. The range of expertise available in APHIS has made the transition smooth and the service excellent.

ADMINISTRATIVE REGULATIONS

In September 1999, the Board published final regulations regarding the availability of official information (5 CFR Part 1204) to comply with the Electronic Freedom of Information Act Amendments of 1996, to update the fees schedule, and to add a time limit to ask for review by the Board's Chairman of an action or a failure to act under the regulations. Certain other changes were made to update the rules on the availability of official information for the benefit of the Board's customers, for consistency, and to comply with the President's Memorandum on Plain Language in Government Writing (64 *FR* 51039, September 21, 1999).

At the same time, the Board published final regulations under the Privacy Act (5 CFR Part 1205) to update the fees schedule, update certain information to conform to administrative changes, and to comply with the President's Memorandum on Plain Language in Government Writing (64 *FR* 51043, September 21, 1999).

The Board also published a revised Organization and Functions Statement (5 CFR Part 1200) to reflect the closing of its human resources management office and the implementation of the cross servicing arrangement with APHIS (64 *FR* 15916, April 2, 1999).

FINANCIAL INFORMATION

The financing sources and current obligations incurred for fiscal year 1999 are listed below. All figures are in thousands of dollars.

Financial Sources

Current Year Appropriations	$25,780
Civil Service Retirement and Disability Trust Fund reimbursements	2,430
Other	12
Total financing sources	28,222

Obligations incurred - current

Personnel	18,349
Personnel benefits	3,301
Benefits for former personnel	18
Travel and transportation	397
Transportation of things	39
Rent-GSA	1,951
Communications and utilities	860
Printing and reproduction	88
Other services	2,547
Supplies and materials	234
Equipment	376
Total obligations incurred	28,160
Unobligated balance	$62

FOR ADDITIONAL INFORMATION

MSPB's World Wide Web site contains information about the Board and its functions, where to file an appeal, and how the Board's adjudicatory process works.

At the Web site, you can get Board regulations, appeal and PFR forms, important telephone and FAX numbers, and e-mail addresses for the headquarters, regional, and field offices.

Complete decisions from July 1, 1994, are available for downloading. The Web site also provides weekly Case Summaries—an easy way to keep up with changes in Board case law.

From the Web site, you can download recent Board reports and special studies on civil service issues.

The Board's Web site is
http://www.mspb.gov.

The Board's toll-free telephone number is **1-800-209-8960**.

Comments or questions regarding MSPB, the Web site, or the toll-free telephone service may be sent to the Board's e-mail address, **mspb@mspb.gov**.

CUSTOMER SERVICE STANDARDS

The Merit Systems Protection Board has two core missions: (1) Adjudication of appeals brought to it under the provisions of law and regulation, and (2) Oversight of the Federal merit systems. These two missions are authorized in the Civil Service Reform Act of 1978.

We have established these standards to assure our customers that they receive the quality of service to which they are entitled and to assure the public as a whole that we are ably promoting and protecting the Federal merit systems.

MISSION I -- Adjudication of Appeals

1. We will make our regulations easy to understand and our procedures easy to follow.

2. We will process appeals in a fair, objective manner, according respect and courtesy to all parties.

3. We will promptly and courteously respond to customer inquiries.

4. We will facilitate the settlement of appeals.

5. We will issue readable decisions based on consistent interpretation and application of law and regulation.

6. We will issue decisions in initial appeals within 120 days of receipt and within 110 days on petitions for review, except where full and fair adjudication of an appeal requires a longer period.

7. We will make our decisions readily available to our customers.

MISSION II -- Oversight of the Federal Merit Systems and the U.S. Office of Personnel Management

1. We will conduct research on topics and issues relevant to the effective operation of the Federal merit systems and the significant actions of the U.S. Office of Personnel Management; perform sound, objective analysis; and where warranted, develop practical recommendations for improvement.

2. We will issue timely, readable reports on the findings and recommendations of our research and make these reports available to all interested individuals and parties.

3. We will enhance the constructive impact of our studies and reports through outreach efforts.

We will conduct surveys of our customers from time to time to see how well we are meeting these standards. However, if at any time, you have comments or suggestions concerning our service, we invite you to provide feedback to the Board, through the Clerk of the Board, at 1120 Vermont Avenue, NW, Washington, DC 20419, telephone (202) 653-7200, FAX number (202) 653-7130. Electronic mail may be sent over the Internet to mspb@mspb.gov.